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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, and PEOPLES SERVICE DRUG STORES, INC., *Appellants*,

v.

ELLIS GADOL and SELMA GADOL, co-partners doing business as FOUR CORNERS PHARMACY, *Appellees*.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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I. Since the Filing of Their Answer to the Complaint in This Case, the Defendants Have Consistently Maintained that the Plaintiffs Had No Legally Protectable Interest and that Any Application of the Fair Trade Act Which Gave Them Such Protection Would Conflict with the Fourteenth Amendment

In their Motion to Dismiss or Affirm, the Appellees complain that the Appellants "did not raise in their briefs or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement". The Appellees, however, lose sight of the

fact that the Appellants here were not the Appellants in the Maryland Court of Appeals.[1] The trial court, in the exercise of its sound discretion, had denied the injunction sought by the complaint because on the facts as shown, the manufacturers involved had failed to exercise reasonable diligence in enforcing their rights. (Jurisdictional Statement 12a). Appellees are correct, therefore, in recognizing that no federal constitutional question was presented by that nisi prius decision and thus none would have been presented here had it been affirmed on appeal.

It was only when the Maryland Court of Appeals reversed the trial court's denial of the relief sought and directed the entry of an injunction for the protection of the complaining retailer, that the statute for the first time was applied so as to conflict with the Fourteenth Amendment, and this conflict was pointed out in defendants' Motion for Reargument. This was not, however, the first time that this federal constitutional question was raised in this case. The repugnance to the Fourteenth Amendment of the application of the Fair Trade Act sought by the plaintiffs, was interposed as an affirmative defense to this action at its very outset, i.e., in the defendants' respective answers. (R. 15 and R. 19).

The defendants did not contend below, and they do not argue here, that the statute in its entirety offends the federal constitution. They merely challenged the particular application of that Act sought by the Complaint in this case. While the Court of Appeals did not discuss the constitutional question in its opinion or in its order denying defendants' Motions for Reargument, it did affirm the right of a retailer to enforce Fair Trade prices in the

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[1] In the interests of clarity, Appellants here, who were appellees in the Court of Appeals, will be referred to herein as the defendants. The appellees will be referred to as plaintiffs.

face of that challenge to the constitutionality of the Act as so applied.[2]

It is therefore clear that "as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution, . . . the case is rightly here" on appeal. *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282, 290. And in *Bryant* v. *Zimmerman*, 278 U.S. 63, 67, this court held: "The decision must have been against the claim of invalidity but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The appellees complain that no question was raised below "as to whether appellees as competing retailers had the right to seek an injunction against the appellants".[3] Defendants' challenge to the standing of the plaintiff retailer may not have been stated to the Court of Appeals in precisely the same terms as it was presented in their Jurisdictional Statement in this court, but the point was clearly made below. (R. 281-283).

It is true that in the Court of Appeals, the argument was confined to showing that the plaintiff retailer had

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[2] The court denied the defendants' Motions for Reargument without opinion (R. 293); but in granting the defendants a stay to permit them to take this appeal, it rejected the plaintiffs' objection that there was no substantial federal question to be reviewed by this court. (R. 290).

[3] In their brief in the Court of Appeals, the plaintiffs themselves raised the question: "Does a competing retailer who is injured by repeated violations of the Maryland Fair Trade Act have the right to seek an injunction against such unfair competition?" As the plaintiffs correctly note in their instant Motion, we pointed out in response that it was not necessary for the Court of Appeals to decide this legal question since on the facts as found by the trial court, the plaintiffs could not prevail in any event.

not shown any injury resulting from the defendants' violation. The defendants in their argument below did not suggest that a retailer could never show the right to such relief. And we may concede that if, as now alleged by the plaintiff, this case had involved "admitted predatory price cutting" (Motion, p. 7), an injunction to prevent such conduct would have conflicted neither with the federal antitrust laws nor the Fourteenth Amendment. But contrary to the plaintiffs' representation to this court, there was no showing or admission that the defendants' price-cuts were predatory—that they were made for the purpose of injuring the plaintiffs or putting them out of business. The only admission and the only testimony in this case was that the defendants sold their merchandise at prices which they believed would be most profitable for them.

Despite the differences in the phraseology of defendants' argument in the Court of Appeals and their Jurisdictional Statement here, the defendants have consistently maintained that the plaintiffs had no legally protectable interest and that any application of the Fair Trade Act which gave them such protection would conflict with the Fourteenth Amendment. This court has recognized that "there are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in good time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant* v. *Zimmerman*, *supra*, 278 U.S. 63, 67. See also *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 598-599.

II. The Unprecedented and Unconstitutional Application of the Fair Trade Laws Made by the Decision Below, Should Be Reviewed by This Court

Appellees also misunderstand the appellants' argument on the merits of this appeal when they suggest that our due process point is premised on an assumption that the Maryland Fair Trade prices were set by the retailers. (Motion, p. 8) Appellants have made no such suggestion. There is no question but that the prices in question were determined in the first instance by the manufacturer in purported compliance with the statute. We do contend, however, that, where, as in this case, the manufacturers perfunctorily establish resale prices, but leave it to competing retailers to determine whether or not these prices are actually observed and enforced, the manufacturer has improperly abdicated his statutory function in favor of the retailer. Until the decision below, neither this court nor the highest court of any state had construed a Fair Trade Act so as to authorize the manufacturer to redelegate to non-signing retailers the price fixing powers which the legislature ostensibly conferred upon him.

That the retail drug industry well recognizes the unprecedented nature of the decision below, is evidenced by the following comment from one of its principal trade publications:

> "It is significant to note that in a retailer-vs.-retailer fair trade suit, the State Court of Appeals ordered a permanent injunction prohibiting Dart Drug and Peoples Drug Stores in Silver Spring, from selling below fair trade prices. *This was the first retailer-vs.-retailer fair trade case to be upheld by the highest court of any state and will probably be regarded as a milestone in the enforcement of fair trade acts.*"[4]

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[4] The Red Book, a 728-page compilation of catalogs and price lists in the drug industry, published by Drug Topics Publishing Co., Inc., page 1. (Emphasis supplied.)

We submit that this decision is a "milestone" which points in the wrong direction and that unless it is corrected now, it will mislead litigants and courts alike into a broadening of the Fair Trade injunction beyond anything which this court, consistent with due process, can condone.

For the foregoing reasons and those set forth in Appellants' Jurisdictional Statement, the appellees' Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted in this case.

Respectfully submitted,

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